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No. 723

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IN THE

Supreme Court of the United States

REPUBLIC PICTURES CORPORATION, *Appellant*,

vs.

FRANCIS KAPPLER, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
8th CIRCUIT.

BRIEF OF APPELLANT IN RESISTANCE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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STATEMENT OF FACTS.

On October 29, 1945 the Circuit Court of Appeals, 8th Circuit, affirmed a judgment of the Federal District Court, Southern District of Iowa, Central Division, allowing a claim of the plaintiff-appellee for overtime pay under the Fair Labor Standards Act of 1938.

The appellant, Republic Pictures Corporation, defendant in the trial court, had pleaded in defense to the claim of the plaintiff, that the same was barred by Chapter 267, Section 1, Laws of the 50th General Assembly of Iowa, which took effect March 23, 1943 and provided as follows:

> "Section 1. In all cases wherein a claim or cause of action has arisen or may arise pursuant to the provisions of any Federal statute wherein no period of limitation is prescribed, the holder of such claim or cause of action may commence action thereon within but not after a period of six months after March 1, 1943, if such claim or cause of action arose prior to March 1, 1943, or within but not later than six months

after the accrual of such claim or cause of action if such claim or cause of action arose after March 1, 1943."

On November 26, 1945 petition for rehearing was denied by the Circuit Court of Appeals.

On December 3, 1945 Notice of Appeal to the Supreme Court of the United States was duly served upon the appellee and service was acknowledged by his attorneys of record, Walter F. Maley and Ted E. Hartung.

Notwithstanding the notice was served in compliance with the Act of January 31, 1928, designated as Chapter 14, 45 Stat. 54 (set out on page 10 of the Appendix to the printed Rules of the Supreme Court) through an abundance of caution, the appellant on December 4, 1945 also filed a Petition for Allowance of Appeal, Jurisdictional Statement and Assignment of Error and on the same day an order was duly entered by Hon. Kimbrough Stone of the Circuit Court of Appeals, allowing the appeal and fixing the amount of supersedeas bond at $4500.00; on December 5, 1945 the order allowing the appeal and supersedeas bond were duly filed.

On December 8, 1945 the appellee was duly served with copies of the petition for an order allowing appeal, together with a copy of the assignment of error and copy of an additional assignment of error which had not then been filed, also a copy of the jurisdictional statement and a notice directing the attention of the appellee to Paragraph 3 of Rule 12 of the Rules of the Supreme Court.

On December 11, 1945 an affidavit of service of the foregoing papers on December 8, 1945 was filed.

The first assignment of error filed by appellant related to the constitutional question involved, and the second assignment of error related to the federal question of whether the evidence showed the appellee to have been "engaged in commerce" or "engaged in production of goods for commerce" under the Fair Labor Standards Act of 1938.

Chapter 267, Laws of the 50th General Assembly of Iowa, the constitutionality of which is involved in this appeal took effect March 23, 1943. Appellee's employment by Appellant terminated on May 20, 1943. The present action was commenced in the trial court on September 8, 1944. Following the decision by the trial court on February 8, 1945 holding the statute in question to be invalid, the legislature of the State of Iowa repealed Chapter 267 by Chapter 222, Laws of the 51st General Assembly, the repeal taking effect on July 4, 1945.

BRIEF POINTS.

THE APPEAL WAS DULY TAKEN BY VIRTUE OF THE NOTICE OF APPEAL SERVED ON THE APPELLEE ON DECEMBER 3, 1945.

Act of Jan. 31, 1928, Ch. 14, 45 Stat. 54.

Section 240(b) Judicial Code, 28 USCA Sec. 347.

A CASE IN WHICH A STATE STATUTE HAS BEEN HELD INVALID UNDER THE FEDERAL CONSTITUTION BY THE CIRCUIT COURT OF APPEALS, IS WITHIN THE DIRECT APPELLATE JURISDICTION OF THE SUPREME COURT.

Secton 240(b) Judicial Code, 28 USCA Sec. 347.

Bradford Electric Light Co. Inc. v. Clapper, Admrx., 1931, 284 U. S. 221, 52 S. Ct. 8.

IN A CASE WHERE THE APPELLATE JURISDICTION OF THE SUPREME COURT IS INVOKED BY REASON OF A DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING A STATE STATUTE INVALID UNDER THE FEDERAL CONSTITUTION, AND A NOTICE OF APPEAL IS SERVED UNDER THE ACT OF JANUARY 31, 1928 (CHAPTER 14, 45 Stat. 54) NEITHER A PETITION TO ALLOW APPEAL OR ORDER ALLOWING THE APPEAL

IS NECESSARY; THEREFORE ALTHOUGH THE FILING OF AN ASSIGNMENT OF ERRORS MAY BE NECESSARY, UNDER THE GENERAL RULE, IT NEED NOT BE FILED WITH A PETITION FOR ALLOWANCE OF APPEAL, THE APPEAL ALREADY HAVING BEEN DULY TAKEN UNDER THE ACT OF JANUARY 31, 1928.

Act of January 31, 1928, Ch. 14, 45 Stat. 54.

THE MATTER CONTAINED IN THE ADDITIONAL ASSIGNMENT OF ERROR FILED BY APPELLANT INVOLVES A FEDERAL QUESTION PRESENTED IN THE CASE. IT IS THEREFORE REVIEWABLE ON THE APPEAL FROM THE DECISION HOLDING THE IOWA STATUTE INVALID AS IN VIOLATION OF THE FEDERAL CONSTITUTION.

Judicial Code, Sec. 240(b); 28 USCA Sec. 347(b).

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS BASED SQUARELY UPON THE PROPOSITION THAT THE IOWA STATUTE IN QUESTION WAS VOID BECAUSE IT VIOLATED THE FEDERAL CONSTITUTION.

Opinion of Circuit Court of Appeals and dissent by Sanborn, J.

REPEAL OF THE IOWA STATUTE AFTER THE APPELLEE'S CAUSE OF ACTION WAS BARRED BY IT, CANNOT BE CONSTRUED SO AS TO AFFECT THE APPELLEE'S CAUSE OF ACTION WHICH WAS ONCE BARRED. THEREFORE, THE QUESTION PRESENTED BY THIS APPEAL IS NOT MOOT.

Sec. 63(1) Code of Iowa, 1939.

Thompson v. Read, 1875, 41 Iowa 48.

STATE DECISIONS CONSTRUING STATE STATUTES OF LIMITATION, ARE BINDING UPON THE FEDERAL COURTS, AND SUCH STATE STATUTES MUST BE AP-

PLIED IN THE MANNER IN WHICH THEY HAVE BEEN CONSTRUED BY THE HIGHEST COURT OF THE STATE.

28 USCA Sec. 725.

Bell v. Morrison, 1 Pet. (26 U. S.) 351.

Van Dyke v. Parker, 1936, (CCA 9th Cir.), 83 F(2d) 35.

Young v. Alexander, 1928, 29 F(2d) 555.

Pickett v. Aglinsky, 1940, (CCA 4th Cir.), 110 F(2d) 628.

IN IOWA, REPEAL OF A STATUTE OF LIMITATIONS DOES NOT APPLY TO CAUSES OF ACTION WHICH WERE BARRED BY THE STATUTE AT THE TIME OF REPEAL. THIS IS A STATUTORY RULE OF CONSTRUCTION APPLIED TO REPEALING STATUTES.

Sec. 63(1) Code of Iowa, 1939.

Thompson v. Read, 1875, 41 Iowa 48.

ARGUMENT.

In his motion to dismiss or affirm the appellee raises three points, which are:

1. That the court is without jurisdiction to entertain appellant's second assignment of error for the following reasons:

(a) It was not presented to and considered by the Eighth Circuit Court of Appeals at the time order allowing appeal was entered.

(b) Assignment of Error No. 2 presents only alleged error based upon a finding of fact by both the United States District Court of Iowa and the Eighth Circuit Court of Appeals.

(c) There is a misjoinder in errors assigned, one at law under assignment of Error No. 1 and one of fact under assignment of Error No. 2.

(d) The Supreme Court of the United States is without jurisdiction to review, consider or determine assign-

ment of Error No. 2 for the reason that the only possible right to prosecute an appeal is derived from Section 240 (b) of the Judicial Code, 28, U. S. C. A., Section 347 (b) which limits the Supreme Court upon appeal to the consideration of questions of law, only, and assignment of Error No. 2 would require the review of questions of fact, as distinguished from the question of law.

2. That the repeal of Chapter 267, Section 1, Laws of 50th General Assembly of Iowa on July 4, 1945 rendered moot the question of the statute of limitations involved in this case.

3. That the decision of the Circuit Court of Appeals, 8th Circuit, in the case at bar did not hold the statute of limitations invalid on the ground of its being repugnant to the Constitution of the United States.

Regarding the last of the above propositions, appellant respectfully submits that the decision of the Circuit Court of Appeals was placed squarely on the ground that the statute in question was invalid because it was repugnant to the Constitution of the United States. The following quotation taken from the majority opinion in the Circuit Court of Appeals should be conclusive upon the foregoing point:

"Were it not for the fact that plaintiff's right can be traced to a federal statute he could have brought his action in five years after its accrual if his contract were not written or he could have brought it in ten years if it were written. His claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment of a claim arising under a federal statute in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme. As said by the Supreme Court in *Stewart & Co. v. Sadrakula*, 309 U. S. 94,

" 'Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.'

"While the sphere of sovereignty of the federal government is a limited one, yet its power over the subjects committed to it is full and complete and its laws are 'The supreme law of the land * * * anything in the constitution or laws of any state to the contrary notwithstanding.' (Art. 6, U. S. Constitution). As a federal right is here involved, the state cannot justify a discrimination against such right. *Miles v. Illinois Central RR. Co.*, 315 U. S. 698.

"In *Pufahl v. Estate of Parks*, supra, an action was brought in a state court by the receiver of a national bank to recover stockholders' liability under a federal statute. Holding that the receiver was governed by the law of the forum with respect to the marshaling of assets, priority of distribution, etc., the court said,

" 'This is not to say that a state may deny all remedy for the substantive right arising out of the federal statute * * *; it is merely to say that *if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character*, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action.' (Italics supplied).

"See, also, *Campbell v. Haverhill*, 155 U. S. 610.

"Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitation for the bringing of such action than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violates Article 6 of the Constitution in that 'it discriminates against rights arising under federal laws.' *McKnett v. St. Louis & S. F. Ry. Co., supra.* Its enforcement would result in denying to those seeking to assert such claims, the equal protection of the law. (14th Amendment, Constitution, Sec. 1). Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination.

"We conclude that this special statute of limitations can not be enforced in federal court. The judgment appealed from is therefore affirmed."

The first sentence in the dissenting opinion of Sanborn, Circuit Judge, is as follows:

"In my opinion, there is no adequate basis for ruling that the Iowa statute of limitations in suit is unconstitutional".

It is therefore apparent that the decision of the Circuit Court of Appeals holds the statute invalid upon two grounds, as follows:

1. That it violates the Supremacy Clause (Article 6 of the Constitution of the United States), and

2. That it denies the equal protection of the law to litigants (Constitution of the United States, Fourteenth Amendment, Section 1).

Further argument on the foregoing point would be superfluous. The issue throughout this litigation has been one of constitutionality of the statute in question.

Regarding the second of the appellee's contentions, viz.: That the issue of the statute of limitations has become moot by virtue of the repeal of the statute of limitations in question by the legislature of Iowa, effective July 4, 1945, it is only necessary to point out that repeal of the statute in question was subsequent to the decision in the trial court holding the statute invalid and that the action of the plaintiff-appellee was fully barred at the time of repeal. Plaintiff-appellee's employment by the appellant terminated May 20, 1943 and the present action was not commenced until September 8, 1944. Therefore, if the statute in question be valid, appellant has a perfect defense to the claim of the plaintiff. In the consideration of this matter it is important to note that the question of the *power* of the legislature to repeal a statute of limitations and have the repealing statute operate retroactively so as to revive causes of action already barred, is not involved, for the statutes of Iowa provide that the repeal of such a statute shall not be construed as applicable to causes of action already barr-

ed. Thus, Section 63, Code of Iowa 1939, provides in part as follows:

"Rules. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"1. Repeal—effect of. The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed."

The Supreme Court of Iowa has held this statute to mean that a repealing statute shall not be construed so as to apply to a cause of action which has once been fully barred. Thus, in *Thompson v. Read* (1875) 41 Iowa 48, the court says:

"A repeal or an amendment of the law could not change the condition of the parties already fixed by the law. The repeal of a statute of limitation, and of course an amendment thereof, cannot act retrospectively so as to disturb rights acquired thereunder and deprive parties of protection to which they were fully entitled under the prior enactments. Actions barred under the statute are not revived upon its repeal. *Norris v. Slaughter*, 19 Green 338 (346); *Specker v. Wakeley*, 11 Wis., 432; *McKinney v. Springer*, 8 Blackf., 506; *Stepp v. Brown*, 2 Ind. 647; *Davis v. Monroe*, 1 How., Miss., 183; *Wiers & Peck v. Farr*, 25 Vt., 41; *Shelley v. Gray*, 11 Wheat, 361; *Woast v. Warnecke*, 3 N. H., 478.

"In this State the repeal of a statute cannot affect any right which has accrued or has been established. Rev., Sec. 29, Code, Secs. 45, 50. It would appear that this provision protects a party from liability upon a cause of action fully barred under the statute of this State by the repeal of such statute or by an amendment operating to restrict its application."

Concerning the rule that the decisions of the highest court of a state are controlling on a question of construction of its own statutes see:

28 USCA Sec. 725.

Bell v. Morrison, 1 Pet. (26 U. S.) 351.

Van Dyke v. Parker, 1936, (CCA 9th Cir.), 83 F(2d) 35.

Young v. Alexander, 1928, 29 F(2d) 555.

Pickett v. Aglinsky, 1940, (CCA 4th Cir.), 110 F(2d) 628.

Regarding the first contention made by the appellee, viz.: That this appeal was improperly taken with reference to the second assignment of errors by the appellant, the appellee appears to have overlooked entirely the act of Congress of January 31, 1928 (Chapter 14, 45 Stat. 54) which provides: "That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: Provided, however, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Because the decision of the Circuit Court of Appeals held a state statute void under the federal constitution, there can be no question but that this appeal could be taken as a matter of right (Section 240(b) Judicial Code, 28 USCA, Section 347).

Appellant admits that the second assignment of errors was not filed at the time the order allowing the appeal was filed. But the appeal had already been properly taken by

service of the notice of appeal (Act of January 31, 1928, Chapter 14, 45 Stat. 54) and under the provisions of the cited section neither a petition for appeal nor order allowing appeal was required.

The only requirement that the assignment of errors be filed at a particular time is to be found in Rule 9 of the Rules of Supreme Court, which requires the assignment of errors to be filed with the petition for allowance of the appeal.

Appellant respectfully submits that under the Act of January 31, 1928, neither a petition for appeal or allowance of appeal is necessary and therefore the second assignment of errors by the appellant was timely. However, if appellant is in error in the foregoing assumption the appeal is nevertheless properly taken with reference to the first assignment of error involving the constitutional issue and which accompanied the petition to appeal.

Appellee further complains that the second assignment of error calls for

(a) Review of a finding of fact,

(b) Involves a misjoinder of errors assigned, and

(c) That the court is limited to a review of questions of law only.

But appellee overlooks the fact that appellant is not requesting the Supreme Court to make a new finding of facts. Appellant challenges the sufficiency of the evidence *as a matter of law* to sustain a conclusion by the trial court that appellee was "engaged in commerce" and therefore within the coverage of the Fair Labor Standards Act of 1938. Appellant asks for no finding of fact by the Supreme Court. Instead, appellant presents the federal question of interpretation of the phrase "engaged in commerce" as used in the Fair Labor Standards Act. Section 240 of the judicial code, 28 USCA Section 347(b) provides that the review on appeal "shall be restricted to an examination and decision of the

Federal questions presented in the case." Appellant asks for no fact finding on this appeal. It submits that if the evidence be taken as a verity, there is no showing that the appellee was "engaged in commerce" as a matter of law.

In closing, appellant directs the attention of the court to the importance of the constitutional question here involved. Within the last two years, at least fourteen other states have adopted statutes of limitation specifically applicable to some type of federally created rights, to-wit:

Alabama	Act 392,	Acts 1943
Colorado	S. B. 165	Laws 1945
Florida	Ch. 21892	Laws 1943
Georgia	Act 439	Laws 1943
Maryland	Ch. 518	Laws 1945
Minnesota	Ch. 513	Laws 1945
North Carolina	S. B. 316	Laws 1945
North Dakota	H. B. 114	Laws 1945
Ohio	S. B. 256	Laws 1943
Oregon	Ch. 265	Laws 1943
South Carolina	Act 346	Acts 1945
South Dakota	Ch. 145	Laws 1945
Tennessee	Ch. 130	Acts 1945 and
Wisconsin	Sec. 330, 215	Statutes 1945

It is therefore important that the matter be considered and settled by an early decision of this court.

Appellant respectfully submits that the motion filed by the appellee is without merit and prays that it be denied in whole and in part.

Respectfully submitted,

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Robt. J. Bannister,

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